"The Indian cases decided on the interpretation of article 311 of the Constitution of India are of persuasive authority."

Now, in the light of *Parshotam's* case *supra*, I am of the opinion that the defendants having terminated the services of the plaintiff under and in accordance with the express terms of the appointment and in the manner required by those terms, it is *prima facie* and *per se* not a punishment and would not attract the application of the provisions of article 135(2) of the Constitution. As regards *Munusamy's* case, *supra*, it should be borne in mind that while it does throw some light regarding the interpretation of article 135(2) of the Constitution, the real question that called for determination in that case was as stated by Lord Hodson at page 201 second column —

"The main question for determination on the appeal is whether the respondent's termination of the appellant's appointment reverting him to his previous post of Immigration Officer under these circumstances amounted to dismissal or reduction in rank for the purposes of clause (2) of article 135 of the Constitution."

In the present case, we are not dealing with any question of reduction of rank and the facts of this case are in no way similar to the facts of that case. Perhaps the only thing which this court should take into consideration is that in *Munusamy's* case *supra*, the Privy Council emphasized that "dismissal" relates to disciplinary action. For reasons which I have stated earlier, there is nothing to suggest that the termination of the plaintiff's services was an exercise by the Public Services Commission of a disciplinary action.

Mrs. Ng Mann Sau in her submission cited the case of *Satish Chandra* v. *Union of India*[4] where it was held that article 311 of the Indian Constitution has no application where it is an ordinary case of a contract being terminated by notice under one of its clauses. In dealing with employment contracts, it was held in that case at page 252 that —

"... the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who chose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations Government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer."

The learned counsel for the plaintiff also submitted that if it is held that there is a contract, then he urged the court to consider clauses 2(d) and 2(e) which, it is contended, are conflicting. In my opinion, under clause 2(e) it is clearly intended that the plaintiff, on acceptance of the appointment, should like other government officers, be subject to government general orders, circulars and other administrative instructions as may from time to time be issued relating to work, conduct and conditions of service of officers in the public service. It was open to the plaintiff to accept or reject the appointment on the terms offered. It is not disputed that the plaintiff did freely accept the appointment. In the instant case, I am also of the opinion that the terms of the appointment as contained in sub-paragraph (e) should not be construed in isolation. It has to be read and indeed it should be subject to the express term contained in sub-paragraph (d) in regard to the question of termination of service.

For the reasons which I have stated, it is my finding that the plaintiff's claim cannot succeed. I therefore dismiss the claim with costs.

Claim dismissed.

Solicitors: *Rithauddeen & Aziz.*

GOVERNMENT OF MALAYSIA v. GURCHARAN SINGH & ORS.

[O.C.J. (Chang Min Tat J.) December 21, 1970]

[Ipoh — Civil Suit No. 466 of 1969]

Contract — Infant — Agreement to serve Government in consideration for being trained as a teacher — Whether void — Whether sureties liable — Necessaries — Whether training constitutes provision for necessaries — Liability of infant and sureties — Provisions for repayment on breach of contract — Whether a penalty — Contracts (Malay States) Ordinance, 1950, ss. 11, 69 and 81.

Damages — Breach of contract — Compensation.

The Government sued the first defendant as the promisor and the second and third defendants as sureties for breach of agreement in writing entered into by them with the plaintiff for providing a course of training at a Malayan Teacher's Training Institution. The claim was for $11,500 alleged to be actually spent by the Government for educating the first defendant. At the time of the contract being entered into the first defendant was an infant and the defence was essentially that the contract entered into by the first defendant was void and that consequently the second and third defendants were not liable. Alternatively it was pleaded that as the first defendant had served the Government for three years ten months out of the contractual period of five years, the claim for $11,500 was excessive and not reasonable compensation. The statement of claim was amended at the hearing to include an alternative claim for the repayment of the sum claimed as having been expended on the infant for necessaries.

Held: (1) the contract entered into by the first defendant was void as he was an infant at the relevant time;

(2) as the second and third defendants were sureties, their liability was co-extensive with that of the principal debtor, and as the principal debtor was not liable, the sureties also were not liable;

(3) the word "necessaries" must be construed broadly and in the circumstances of this case, the provision of professional or vocational training for the first defendant in a Teacher's Training Institution to enable him to qualify for and accept appointment as a teacher was a provision for necessaries;

(4) the first defendant was therefore liable for the repayment of the sum expended for his education and training as being expended on necessaries;

(5) the provisions for repayment for breach in the contract was a penalty clause and therefore not enforceable;

(6) the amount of damages payable in this case must be based on repayment of the proportion of the actual sum expended based on the completed months of service and in the circumstances judgment would be given for the plaintiff against the defendants for $2,683.

Cases referred to:-

(1) *Mohori Bibi & Anor.* v. *Dhurmodas Ghose*, (1902-3) L.R. 30 I.A. 114.

(2) *Nash* v. *Inman*, [1908] 2 K.B. 1, at p. 8.

(3) *Sohan Lal* v. *Puran Singh*, A.I.R. 1916, Lahore 376.

(4) *Kashiba* v. *Shripat Nashiv*, (1895) I.L.R. 19 Bom. 697.
(5) *Chhajju Singh* v. *Emperor*, (1921) 22 C.L.J. 662; A.I.R. 1921 Lahore 79.
(6) *Jamna Bai* v. *Vasanta Rao*, (1915-16) L.R. 43 I.A. 99.
(7) *Kelappan Nambiar* v. *Moolakai Kunhi Raman*, A.I.R. 1957 Mad. 164.
(8) *Waulthier* v. *Wilson*, (1911) 27 T.L.R. 582.
(9) *Coutts & Co.* v. *Browne-Lecky & Ors.*, [1947] K.B. 104.
(10) *Chapple* v. *Cooper*, 153 E.R. 105.
(11) *Walter* v. *Everard*, [1891] 2 Q.B. 369 at p. 374.
(12) *Roberts* v. *Gray*, [1913] 1 K.B. 520 at p. 525.
(13) *Esteb* v. *Esteb*, 47 A.I.R. 110.
(14) *Middlebury College* v. *Chandler*, 16 Vt. 683; 42 Am. Dec. 537.
(15) *Srinivasa Pillai* v. *Balasubramani Odayar*, A.I.R. 1926 Mad. 592.
(16) *Birch Brothers Ltd.* v. *Brown*, [1931] A.C. 605 at p. 631.
(17) *Cory* v. *Cook*, 24 R.I. 421, 53 Art. 315.
(18) *Government of Malaysia* v. *Thelma Fernandez & Anor.*, [1967] 1 M.L.J. 194.
(19) *Bridge* v. *Campbell Discount Co. Ltd.*, [1962] A.C. 600.

CIVIL SUIT.

Dato' Sheikh Abdul Rahman (Senior Federal Counsel, *Miss Chan Loo Thye* with him) for the plaintiff.

M. Sivalingam for the defendants.

Cur. Adv. Vult.

Chang Min Tat J.: In this action, the Government of Malaysia sued the first defendant as the promisor and the second and third defendants as sureties for breach of an agreement in writing entered into by them with the plaintiff for providing a course of training at a Malayan Teachers' Training Institution between 1960-1961. The cause of action was founded on a breach of the said agreement by the first defendant to serve the Government as a teacher for five years after the training and the claim was for $11,500 alleged to be actually spent by the Government on educating the first defendant as provided for in the agreement, interest and costs.

In the events that happened, as the result of the death of one of the original sureties, the third defendant by a further agreement consented to be bound by the terms and conditions of the first agreement in place of the deceased surety.

The defence was essentially that the contract entered into by the first defendant was void as entered into during minority and that consequently the second and third defendants were not liable, alternatively that having regard to the fact that the first defendant had served the Government for three years ten months out of the contractual period of five years, the claim for $11,500 was excessive and not reasonable compensation.

With the despatch with which I have now come to associate the advocacy of learned counsel for the defence, an agreed statement of facts was put in. It was of such details that oral evidence was not necessary and the case could stand to be determined on submissions.

The additional facts are not really relevant. After completion of his training which was given at Kirkby in England in 1961, the first defendant served between 1st January, 1962 to 4th August, 1968, except for a period between 18th May, 1964 to 29th January, 1967, when by agreement the service was suspended to enable him to undertake a course of studies at the University of Malaya. At his resignation, he had served 3 years 10 months, leaving a balance of 1 year 2 months unserved. It was and is the Government's policy to train persons as teachers in order to provide education for the evergrowing population in post-Merdeka Malaysia.

The statement of claim, as originally delivered, relied entirely on the contract, but at the hearing, it was amended to include an alternative claim for the repayment of the sum claimed as having been expended on the infant for necessaries. Counsel for the defendants with characteristic generosity did not object, though the amendment clearly relied on a new cause of action.

I am of the opinion that on the pleadings this case stands logically to be decided in the following order (a) the liability of the infant on the contract for breach and (b) the liability of the second and third defendants on the contract for breach, and if the answer to either (a) or (b) is no, then (c) the liability of the first defendant and (d) of the second and third defendants as sureties on a claim for necessaries and (e) the amount, if any, payable on a claim for necessaries. And I propose to consider the case in this order.

It is, I consider now settled law that an infant's contract is under the Indian Contract Act and our Contracts (Malay States) Ordinance void and not merely voidable. In *Mohori Bibi & Anor.* v. *Dhurmodas Ghose*,(1) the Judicial Committee of the Privy Council held in no uncertain terms that section 11 of the Indian Contract Act which is *in pari materia* with section 11 of the Contracts (Malay States) Ordinance 1950, and which is in these words:

> "11. Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

read together with section 68 of the Indian Contract Act which is *in pari materia* with section 69 of our Ordinance and which is in these words:

> "69. If a person incapable of entering into a contract or anyone whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person."

makes it

> "... beyond question that an infant falls within the class of persons here referred to as incapable of entering into a contract and it is clear from the Act that he is not liable even for necessaries and that no demand in respect thereof is enforceable against him by law, though a statutory claim is enforceable against his estate."

Mohori Bibi and Anor. v. *Dhurmodas Ghose* was a case in which the infant mortgagor sued the mortgagee for a declaration that his mortgage was void and inoperative on the ground that when he executed it, he was under age. The judgment entered for the in-

fant in the High Court was upheld on appeal by the Court of Appeal and by the Privy Council, though on somewhat different grounds. In the first place, the Privy Council considered that the Indian Contract Act provided that an infant's contract is void, not voidable, as held in the Indian Courts. In the second, section 41 of the Indian Specific Relief Act of 1877, which corresponds to section 37 of our Specific Relief (Malay States) Ordinance which reads:

"37. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

might give a discretion but the Privy Council decided that the discretion that was exercised to refuse the relief was rightly exercised in the face of the finding of the court of first instance of the knowledge of the mortgagee and lastly that it was not equitable to compel a person to pay any money in respect of a transaction which as against that person the legislature had declared to be void.

It is, I think convenient at this stage to determine the basis of the liability for necessaries in an infant's contract. On this Fletcher-Moulton L.J. had this to say in *Nash* v. *Inman*[2] at page 8:

"I think that the difficulty and at the same time the suggestion of hardship.... in such a case as this disappear when one considers what is the true basis of an action against an infant for necessaries. It is usually spoken of as a case for enforcing a contract against the infant, but I agree with the view expressed by the court in *Rhodes* v. *Rhodes* 44 Ch. D. 94 in the parallel case of a claim for necessaries against a lunatic, that this language is somewhat unfortunate. An infant, like a lunatic, is incapable of making a contract of purchase in the strict sense of the words, but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services so rendered and will enforce that obligation against the estate of the infant or lunatic. The consequence is that the basis of the action is hardly contract. The real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied. In other words, the obligation arises *re* and not *consensu*."

This passage which so far as I can discover has never been dissented from, applies strictly of course to English law but in my view is equally applicable to our law of contract, as is clear from a reading of section 69 of our Ordinance, *supra*, which merely embodies the common law of England regarding liability for necessaries supplied to an infant.

If an infant is totally incompetent and incapable of entering into a contract, there is no contract on which he can be sued. Further the liability of an infant for necessaries supplied to him does not arise *ex contractu* and the obligation is not *consensu*. It is *re* and section 69 of our Ordinance, *supra*, which embodies the English common law of the liability of an infant to pay a reasonable sum for necessaries in my view makes it clear that it is so in this country. While on this subject, it is interesting to note that in discussing the effect of section 65 of the Indian Contract Act (section 64 of our Ordinance), the judgment in the Privy Council case stressed that any reliance thereon must start from the basis of there being an agreement or contract between competent parties and it could have no application to a case in which there was or never had been any contract. The claim therefore of the Government on the contract against the first defendant for breach must fail.

Insofar as the second and third defendants are concerned, their liability on an infant's contract for breach must be determined on their status as sureties or guarantors. It was the submission of the learned federal counsel that section 81 Contracts (Malay States) Ordinance which reads:

"81. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

made the second and third defendants as sureties liable as principal debtors. Section 81 of our Ordinance is *in pari materia* with section 128 of the Indian Contract Act and reliance was placed on three cases: (1) *Sohan Lal* v. *Puran Singh*,[3] *Kashiba* v. *Shripat Nashiv*[4] and *Chhajju Singh* v. *Emperor*.[5] The case of *Jamna Bai* v. *Vasanta Rao*[6] was also cited but this last case was a case of two joint promisors one of whom was a minor and it is easily distinguishable.

Alternatively, the learned federal counsel argued that the agreement of the second and third defendants was an indemnity.

There is of course a distinction between an indemnity and a guarantee, a distinction which is implicit in their statutory definitions in section 77 and section 79 of our Contracts Ordinance (corresponding to section 124 and section 126 of the Indian Contract Act). Their respective liability is set out in the following headnotes in the published judgment of the Division Bench of the Madras High Court in the case of *Kelappan Nambiar* v. *Moolakai Kunhi Raman*:[7]

"There is a distinction between a contract of indemnity on the one hand and a contract of guarantee or suretyship on the other. Where the contract is one of indemnity, the non-liability of the principal debtor does not affect the obligation undertaken by the indemnifier which is primary and in several cases it is the possibility of this non-liability that is the occasion for a contract of indemnity. Every contract of guarantee, however, is not a contract of indemnity having this effect, for, in the absence of special circumstances, the liability of a surety is only ancilliary and can rest only on a valid obligation on the part of the party whose debt or obligation is guaranteed."

which, with respect, appears to me to be a correct statement of the law and which I propose to adopt. The judgment of the Division Bench of Madras dealt with the cases referred to earlier on which federal counsel relied as well as others and with another line of cases which held the contrary view. It was in fact this conflict of judicial decisions that prompted the trial judge at first instance to refer the matter to a Bench. In its judgment, the Division Bench undertook a full and comprehensive review of all the cases touching on this point. The review is something which is beyond the resources both material and intellectual at my disposal, but even if I have the means and the ability, I could not but be impressed with the full discussions and the reasoning and be bound, with all respect, to adopt the judgment.

In the course of this review made on a chronological basis, the Division Bench found that the line of authorities on which the learned federal counsel relied com-

menced with *Kashiba's* case, *supra*, that all the other cases in the line, including *Chhajju Singh's* case followed it without independent or additional reasoning, and that Farran J. in *Kashiba's* case had relied on English law, certain text books, in particular on a passage in *Chitty* on Contracts, and a few decisions referred to therein. It also discussed the other line of cases and noted that one of the English cases *Waulthier* v. *Wilson*[8] on which Farran J. relied was not followed in *Coutts & Co.* v. *Browne-Lecky & Ors.*[9] and that the decision in *Waulthier's* case would not have been maintained if the court found that the contract was a guarantee and not an indemnity. In short, the Division Bench found a preponderance of considered judgments that did not support the broad line adopted by learned federal counsel. It also noted that the text books had in subsequent editions changed their views. It therefore held that the surety to a minor's liability on a *kuni* (which I understand to be a lottery version of our local ton-tine) was not bound to meet the default of the minor. In its judgment occurred the following passage:

> "It is to our mind clear that the law laid down in section 128 of the Indian Contract Act enacts the same rule. In the absence of special circumstances, like fraudulent representation or in the absence of other features from which a court could infer the contract to be one of indemnity, as defined in section 124 of the Indian Contract Act, the liability of the surety is only ancillary and can rest only on a valid obligation on the part of the party whose debt or obligation is guaranteed. *Kashiba's* case is not when properly understood against this view as on the facts the obligation undertaken by the father appears to be one of indemnity rather than on guarantee."

It found support from this passage from a judgment of the full Bench in another case:

> "Section 128 of the Indian Contract Act says that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. It is a settled principle of law that the surety's liability is only accessory and secondary... That can only mean that his liability is no less or no more than that of the principal debtor."

and it quoted with approval this passage from another judgment:

> "When the creditor seeks to enforce the debt against the surety, the latter is legitimately entitled to ask 'Is the principal debtor himself liable?' If not, he has committed no default and you cannot compel me to discharge an obligation which has no existence...."

In the case of *Coutts & Co.* v. *Browne-Lecky & Ors.*, *supra*, referred to in the judgment, Oliver J. dismissed the claim of the bank against the infant and the sureties for repayment of an overdraft granted to the infant.

I do not think it is necessary or even a profitable exercise to distinguish the plethora of Indian cases. As I understand the law and as at present advised, I find myself bound to disagree, though not without diffidence, with the contention of learned federal counsel and to accept the submission of learned counsel for the defence that in the case of contracts of guarantee as distinguished from contracts of indemnity the *sine qua non* of the liability of the surety is the existence of the liability of the principal debtor. I think the terms of section 81 of our Ordinance make it clear. The liability of the sureties is co-extensive with that of the principal debtor and it follows, in my view that if the principal debtor is not liable as on a void contract, the sureties whose liability is co-extensive are not any more liable.

It now falls to be determined whether on the facts as agreed and on a proper interpretation, the agreement of the second and third defendants was a guarantee as claimed by the defence and partially admitted by the Government, or an indemnity as averred by Government.

The recital to the agreement referred to the second and third defendants as sureties who had agreed to guarantee the performances of the obligation of the first defendant. The first defendant's obligation and undertaking were expressed to be with the consent and approval of the sureties, and it was provided that in the event of any breach or misconduct the first defendant and the second and third defendants would jointly and severally be liable to Government for all moneys deemed to have been paid by Government in respect of the first defendant's studies.

With respect, in my interpretation, this agreement is not one where the second and third defendants promised to save Government from loss by the conduct of the first defendant, within the meaning of an indemnity in section 77 of our Contracts Ordinance but a contract to discharge the liability of the first defendant in the event of his default, within the meaning of a contract of guarantee in section 79 of the Ordinance. Accordingly, I hold that the second and third defendants were guarantors or sureties.

It follows that I must hold that the claim by Government against the second and third defendants for breach on a void contract also fails.

The next question that falls to be decided is the newly introduced alternative claim for necessaries. The claim is founded on section 69 of our Contracts Ordinance and is the statutory claim referred to in the judgment of the Privy Council. On this, the industry of counsel has not unravelled any strictly parallel case and all that counsel could do (and I say so as a fact and with no intention to show anything but high regard for their commendable industry and arguments) was to rely on *obiter dicta*.

In his submission, learned federal counsel relied on the following passages from three English cases:

> (a) "Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging and the like. About these there is no doubt. Again as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade or intellectual, moral and religious information may be necessary also...."

per Alderson B. in *Chapple* v. *Cooper*[10] and

> (b) "Then what are necessaries for an infant? Food and clothing always are necessaries, if the infant cannot obtain them in any other way. Is education a necessary for an infant? Looking at it independently of authority, I should say that education in a trade with a view to making an infant a useful citizen must always in this working country have been thought of the greatest importance and must always have been considered a necessary for an infant. But on this point, we have the authority of the passage in *Coke upon Littleton*, p.

172(A) in which Lord Coke lays it down in effect that education in a trade is a necessary for an infant, or rather I should say one of that class of things which may be a necessary."

per Lord Esher M.R. in *Walter* v. *Everard*[11] at page 374 and

(c) "... it is important to remember that as early as Lord Coke-Co. Litt 172A — it has been held that an infant's contract for necessaries is binding, and it was laid down by him that the doctrine also applied not merely to bread and cheese and clothes, but to education and instruction. That has been construed in this court in the case of *Walter* v. *Everard, supra,* in a very wide sense."

per Cozens-Hardy, M.R. in *Roberts* v. *Gray*[12] at page 525.

Now, *Chapple* v. *Cooper* is a case dealing with an infant widow's liability for providing her husband with a decent Christian burial, which the court held as a necessary. *Walter* v. *Everard* is a claim against an infant for premium for instruction in a trade, the jury finding that the apprenticeship deed was a provident and proper arrangement for him. *Roberts* v. *Gray* is a case in which an infant entered into a contract to go on tour as a professional billiard player. It will therefore be seen that the passages quoted are all *obiter dicta,* though that is not to say that they have not been of assistance to me.

My attention was also drawn to the case of *Esteb* v. *Esteb*[13] in which it was held by the Washington Supreme Court on appeal by a majority that the father of a child might be required to provide his minor child with a college education if the child had evinced an aptitude for it, even though the father was divorced from the mother of the child. It was submitted by learned federal counsel that this case was authority for the proposition that what was the station of life of the infant must be related to the facts, and that apart from the needs of the infant, the needs of the country were also to be considered and consequently that the expenditure expended in training the first defendant as a teacher was incurred on necessaries for the infant.

For the defence, it was pointed out that though the contract merely stipulated for training at a Malayan Teachers' Training Institution, in fact the student was sent to Kirkby and it was suggested that if training for a teaching post was a necessary, the increased expenditure consequent on the selection of an institution in England in preference to a local institution must in itself remove the matter from the class of necessaries. The passage in Lord Esher's judgment in *Walter* v. *Everard, supra,* at page 374 which followed the passage recited above

"What will make it a necessary? If the infant can obtain the education which he requires in another way, it may not be a necessary. You must have regard to the condition of the infant in life — whether, for instance, he is a young man who will have to earn his living by his own exertions, ..."

was relied on.

Then it was said that at the best the agreement could be construed as one for the benefit of the first defendant but that did not bring it within the scope of section 69 of our Contracts Ordinance as the law specifically recognised only one exception and that was a claim for necessaries, so that a claim upon the ground that the contract entered into by an infant was nevertheless enforceable against him because it was made for his benefit was not maintainable in our courts, whatever the position in England might be.

It was also submitted that necessaries in section 69 covered only goods, articles and other services supplied but not education and instruction and definitely not training as a teacher. The one English case, that of *Roberts* v. *Gray, supra,* in which it was held by Cozens-Hardy M.R. that the doctrine of necessaries applied not merely to bread, cheese and clothes but also to education was criticised by the learned authors of *Cheshire and Fifoot's* Law of Contract, 7th Edition, on the ground that all the authorities relied on in that case concerned beneficial contracts of service, which were submitted to be beyond the pale of our section 69. In this case, it was urged on me that the provisions for training as a teacher did not fall within the meaning and scope of necessaries, since the infant was sent to England not to satisfy his need for training but to meet the Government's need for more qualified teachers. This case then was said to fall squarely within the supply of fancy waistcoats case of *Nash* v. *Inman, supra.* As has been said, the fact that buttons are a normal part of many usual kinds of clothing will not make pearl or diamond buttons necessaries.

If I have taken more time and space than I should have in setting out in such details the arguments of learned counsel for the defence, it is because the arguments are not without persuasion and force, especially as there appeared to be some decisions, admittedly all American, that a boarding school education, a higher education in college (see, *inter alia, Middlebury College* v. *Chandler,*[14] or for a profession or a five-year course of instruction at a correspondence school had been held not to be necessaries (see: page 1263 Vol. II *Sanjiva Row's* Commentaries on Indian Contract Act (6th Edition)).

I confess I find this case of some difficulty. There is no statutory definition of what are necessaries, save that what is supplied must be suited to the infant's condition in life. No decisions have been found which could directly be of help, and what decisions there are of what constituted necessaries cannot be of any great assistance as the cases were clearly decided on their peculiar facts, and the circumstances of the infant's life and needs.

It would therefore be salutary to determine the proper approach to this case. In *Srinivasa Pillai* v. *Balasubramani Odayar,*[15] the Madras High Court rejected the view of the district munsif that the supply of two bulls to an infant could never be considered necessaries, and holding that the question in each particular case would have to be decided on the evidence let in by the parties on the question, remitted the case to the court of first instance for evidence and a finding on the evidence.

That this is a salutary approach to the problem I have not the slightest doubt. Whether the article supplied is a necessary for the infant concerned is a question of fact and law and the fact must be found on the evidence adduced. Each case therefore stands

to be decided on the facts pertaining to it and whether what is supplied is a necessary suited to the infant's condition becomes as much a question of law as of fact.

In the instant case, there is however no evidence of the financial position of the infant to establish one way or the other his ability by his own means to seek the training he sought but having regard to the fact that admission to the teaching profession or service is only through training in a Government institution, which cannot be paid for or bought but must be applied for and awarded on a scholarship basis, I do not consider that that was of any consequence. If a student evinces any interest in becoming a teacher, then his ambition could only be met by admission to a training institution and that he could secure only by applying for the same and being selected for it and in this connection, the state of his financial resources has, so far as I can discover, no relevance. Further if he can be said after successful training to be meeting the needs of the country for qualified teachers in a developing and rapidly expanding country, it must be equally true to say that in so doing he has had his own needs met and satisfied.

As for the reliance of learned counsel for the defence on the line of cases which appeared to establish that only training in a trade or occupation was held to be necessaries, this must on reflection be seen to be no more binding in the different conditions now obtaining. In the days when these cases were decided, higher education was not of that need and urgency before employment could be obtained. Especially in a working country such as England, even a basic elementary education was then not necessary. All that was needed was at the best some technical training and that generally of a practical nature and at the worst training to achieve manual dexterity. Under such circumstances academic learning was naturally regarded as a luxury. But as society advanced, as the ideal of compulsory and free elementary, and later free secondary education became developed and formalised in statutory provisions and as the population increased and with it the competition became keener, conditions changed and the change must necessarily invalidate old arguments. *Cessante ratione legis, cessat lex ipsa.* If there should be any doubt as to the application of this legal maxim to judicial decisions, reference should be made to *Jenk's* Book of English Law (4th Edition) pages 52-53.

The answer to the defence submission appears to me to be this: in the first place *Coke upon Littleton* had not chosen to enlarge on what were necessaries and in the second, in contradistinction to English Statute Law, where there is in the proviso in section 2 of the Sale of Goods Act, 1893 which reads:

"Provided that where necessaries are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkeness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person and to his actual requirements at the time of the sale and delivery."

a definition of goods constituting necessaries, there is no such definition in our parallel ordinance. It may be argued that the statutory definition only expressed what is the common law of England, but in my view it would be truer to say that it does so only with respect to goods supplied and delivered, as submitted by learned counsel for the defence but a definition contained in an enactment expressedly limited to goods does not exclude by statutory intervention that part of the common law relating to education as a necessary. To this extent, I am of the opinion that the criticism levelled against the decision in *Roberts* v. *Gray, supra,* cannot have any relevance in this country and that the English cases cited to me on the supply of material goods are not strictly relevant and are clearly distinguishable. So far as they are concerned, I do no think I have transgressed the principle of *stare decisis,* to which I fully subscribe but where I can do so, I adopt, with all respect, the attitude of Lord MacMillan in *Birch Brothers Ltd.* v. *Brown,*[16] at 631 that

"Precedents should be stepping stones and not halting places."

If there should be any doubt that necessaries include in certain circumstances education, the judgments of Lopes L.J. and Fry L.J. in *Walter* v. *Everard, supra,* would remove it. Lopes L.J. at page 377 said:

"I think they (the authorities) also establish that education may be a necessary for an infant. Whether it is, and whether the particular kind of education is a necessary, is always a question for the jury; the position of the infant in life and his circumstances must be taken into consideration."

Fry L.J. after noting that *Lord Coke upon Littleton* (172A), said "an infant may bind himself for his good teaching or instruction, whereby he may profit himself afterwards," himself considered that

" 'teaching or instruction' though it includes instruction in a trade, is not necessarily confined to that. I should be sorry to conclude that literary instruction likely to lead to the infant's success in a learned profession is not within the observation of Lord Coke; the interests of the State require that an infant should be able to bind himself for instruction of that kind."

In this connection, I am of the considered opinion that the decision to send the infant to England and not to a local training institute does not, *per se,* take the provision out of the class of necessaries. The decision that was taken was undoubtedly made on a variety of factors, for example, availability and suitability and in the absence of any evidence that pearl or diamond buttons were supplied, I find myself unable to accept the contention of learned counsel for the defence.

In my view, the word "necessaries" must be construed broadly and in any decision involving whether what are supplied are or are not necessaries, it is incumbent to have regard to the facts of the case, the conditions and circumstances in which the supply was made and the purpose which is served. I find confirmation in my approach to this case in *Esteb* v. *Esteb, supra,* where Askren J. in his majority judgment after noting that the American court in *Cory* v. *Cook,*[17] had cited with approval the following passage from another judgment:

"It would be difficult to lay down any general rule upon this subject, and to say what would or would not be necessaries.

It is a flexible and not an absolute term having relation to the infant's condition in life, to the habits and pursuits of the place in which he lives and to the changes in those habits and pursuits occurring in the progress of society."

and had gone on to say

"It is clear from the foregoing statements of the law... that the word 'necessaries' is a relative term, and is not limited to those things which are indispensable to the infant's personal support and comfort. Whether a college or a strictly professional education could be classed with necessaries under any circumstances we are not called on to decide. But that such an education and training as will fit him for the ordinary duties of life in the sphere in which he moves and enable him to earn a respectable and honest living in his chosen vocation should be so classed, we have no doubt."

himself thought that

"Nor should the court be restricted to the station of the minor in society but should in determining this fact take into consideration the progress of society and the attendant requirements upon the citizens of today."

Askren J. further noted that the case of *Middlebury College* v. *Chandler, supra,* which was said to have laid down the rule that a college education was not a necessary, was based on conditions which existed at that time, and that an opportunity at that early date for a common school education was small, for a high school education less, and that a college education was almost impossible to the average family and was generally considered as being only within the reach of the most affluent citizens. The learned judge went on to say and we should, I think, remind ourselves that that was in 1926:

"But conditions have changed greatly in almost a century that has elapsed since that time (i.e. since *Middlebury College* v. *Chandler*). Where the college graduate of that day was the exception, today such a person may almost be said to be the rule. The law in an attempt to keep up with the progress of society has gradually placed minimum standards for attendance upon public schools and even provides punishment for those parents who fail to see that their children receive at least such minimum education: that it is the public policy of the State that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the State of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education."

Basically the action stands to be determined on the interpretation of the word "necessaries." In the absence of any limitation or qualification of this word either in *Lord Coke upon Littleton* or in our Contracts Ordinance, it seems to me that the rule in interpretation is that expressed in the maxim *Generalia verba sunt generaliter intelligenda;* in other words that it is a basic rule of construction that general words should be given a general construction, that is, they should be given their full and natural meaning.

In my view of the circumstances of this case, the provision of professional or vocational training for the first defendant in a Teachers' Training Institution to enable him to qualify for and accept the appointment as a teacher is a provision for necessaries. It follows that in my judgment I must find the first defendant liable for the repayment of the sums expended on his education and training as being expended on necessaries. His *quasi ex contractu* obligation must in his infancy be met from his estate but in the circumstances of this case, the first defendant has at the hearing reached the age of majority and I hold him liable personally.

It also follows that the sureties are themselves liable as such sureties.

The last question then is the amount payable. All the decisions on the payment for necessaries have referred to the payment not of the stipulated prices but of a reasonable price for them. Among others, Lopes L.J. said at page 376 in his judgment in *Walter* v. *Everard, supra:*

"An infant can be sued upon his single bond, *i.e.* a bond without a penalty, given for necessaries supplied to him, provided it is shown that the thing for the price of which the action is bought was necessary and that the charge for it was reasonable."

However learned federal counsel relied on the case of *Government of Malaysia* v. *Thelma Fernandez and Anor.*,[18] in which Raja Azlan Shah J. held that the provision for repayment for breach was not a penalty but a genuine and reasonable estimate of the damages suffered following the breach. On the other hand, Mr. Sivalingam argued on the authority of *Campbell Discount Co. Ltd.* v. *Bridge*[19] that any provision which quantified the penalty as the same whether the breach occurred *ab initio* or whether the breach occurred after a part of the 5 years stipulated had been served must necessarily and *ex hypothesi* be regarded as a penalty clause. The validity of this argument would be apparent in the case of breach one day before the full period expired. The *Campbell Discount* case did not appear to have been submitted for the consideration of my learned brother, whom it is for me most painful and what is more to the point most difficult to disagree with, but in view of what Miss Chan Loo Thye, federal counsel told me, in open court for which I am greatly obliged to her, I consider I am saved the extreme embarrassment of disagreeing. The *Thelma Fernandez's* case went on appeal to the Federal Court, where, as advised me by Miss Chan, on a suggestion by the Federal Court, the claim was settled on a compromise. In my view, if I may say so, the compromise was founded on eminent good sense and though wanting the authoritative decision of the Federal Court, the *Thelma Fernandez* case must, I believe, be now seen to be no more good law.

In this case there can however be no question of the actual sum expended. The only question is the proportion payable.

As for this question, there are conceivably two approaches, the first on the basis of the completed years of service and the second on the basis of the completed months of service. In view of the payment of monthly salaries and the generally accepted procedure of termination by either side giving one month's notice, I find myself in favour of the second approach. In the instant case, the first defendant had still to serve 1 year 2 months out of the stipulated 5 years. On the fraction of 14/60 of $11,500, the amount due would be $2,683 to the nearest dollar.

There will therefore be judgment for the Government of Malaysia against the defendants for $2,683.

On the question of costs, if I consider that the Government has succeeded only on its last minute amendment and that the Government has in this action persisted in its full claim when in the *Thelma Fernandez's* case it had accepted the hint to compromise, I should, I think, hold that the more reasonable order would be that each party should pay its own costs and I so order.

Claim partly allowed.

Solicitors: *Lim Cheng Ean & Co.*

TAY WEE KHYUN v. AMERICAN INTERNATIONAL ASSURANCE CO. LTD. THE "YULING No. 2"

[O.C.J. (B.T.H. Lee J.) December 31, 1970]

[Kuching — Civil Suit No. K.37 of 1969]

Insurance — Marine insurance — Salvage — Salvage charges — Particular charges — Total loss — Partial loss — Whether insurance policy covers particular charges and partial loss.

Shipping — Capsized vessel — Salvage remuneration and repairs.

The plaintiff, the owner of a vessel insured against marine losses with the defendants, brought a claim against the defendants for salvage remuneration and repairs. The vessel had capsized and the plaintiff took steps to salvage the ship. The policy covered total loss and constructive total loss and salvage cost.

Held: (1) the expenses incurred by the plaintiff were not salvage charges but particular charges and the insurance policy in this case did not expressly provide cover for particular charges;

(2) the present case was not a case of total loss, either actual or constructive but one of partial loss;

(3) as the claim in this case was for particular charges and not salvage charges and as the policy in this case covered only salvage charges and was for only total loss, actual or constructive, the claim of the plaintiff must fail.

Cases referred to:-

(1) *Hird* v. *Rea Ltd.* (1939) 63 Ll. L.R. 263.

(2) *Ralli* v. *Janson* 119 E.R. at p. 925.

(3) *Overseas Commodities Ltd.* v. *Style* [1958] 1 Ll. L.R. 546.

(4) *Yorkshire Insurance Co. Ltd.* v. *Campbell* [1917] A.C. 218.

(5) *Hart* v. *Standard Marine Insurance Co. Ltd.* (1889), 22 Q.B.D. 499.

(6) *Miller* v. *Borner & Co.* [1900] 1 Q.B. 691.

(7) *Aktieselskabet Reidar* v. *Arcos Ltd.* [1927] 1 K.B. 352.

CIVIL SUIT.

C. T. Wong (*T. K. Sim* with him) for the plaintiff.

S. K. Reddi (*C. S. Wu* with him) for the defendants.

Cur. Adv. Vult.

B.T.H. Lee J.: The plaintiff in this case, the owner of a steel barge *Yuling No. 2*, was insured against marine perils under a policy of marine insurance in the sum of $100,000.

The vessel was designed to carry logs, heavy equipment and cargo. The vessel was insured with the American International Assurance Company Limited, the defendants, for total loss and constructive total loss, and to include salvage cost.

As a result of events occurring on 18th December, 1967, the vessel laden with 700 tons of stones capsized off the coast of Bintulu.

The plaintiff informed the insurance agent of the occurrence. Thereafter the plaintiff took steps to salvage the vessel.

The action was brought to recover against the defendants salvage remuneration and repairs for the sum of $40,534.51, and general damages.

The plaintiff by his statement of claim alleged as follows: —

"(1) The plaintiff was insured to the amount of M$100,000.00, under a policy of Marine Insurance for that amount, dated the 21st day of September, 1967 on the steel barge *Yuling No. 2* subscribed by the above-mentioned defendants for M$100,000.00. The said plaintiff now claims under the said policy of Marine Insurance for the amount of M$40,534.51 in respect of charges for salvage of and repairs effected on the said *Yuling No. 2*.

(2) By the said policy of Marine Insurance, Hull Insurance policy No. 191946, dated the 21st day of September, 1967 the said defendants in consideration of a premium of M$2,730.14 insured the said plaintiff for M$100,000.00 upon the said *Yuling No. 2* whilst it was engaged in carrying logs, heavy equipment and general cargo between Sarawak, Brunei and Sabah ports during the period of noon of the 15th day of September, 1967 to noon of the 13th day of July, 1968 against total and/or constructive total loss including salvage and repair charges caused by the perils of the seas.

(3) Whilst on a voyage from Sebuyau to Miri on or about the 13th day of December, 1967, and whilst the plaintiff was insured as aforesaid, the said *Yuling No. 2*, owing to foul weather and rough seas, capsized off the coast of Bintulu on the morning of the 18th day of December, 1967, thereby involving the plaintiff in loss and expenses for salvage and repairs aforesaid."

Particulars of the said loss and expenses are shown as follows: —

"(1) The cost of hiring 4 tugboats to attempt to tow *Yuling No. 2* from the sea to Bintulu River as from the 19th to 21st day of December, 1967 (3 days) at M$100.00 each boat per day	$ 1,200.00
(2) The cost of hiring one tugboat to stand by on guard of *Yuling No. 2* while it was at sea off Bintulu coast	$ 450.00
(3) The cost of hiring 4 tugboats to pull *Yuling No. 2* from grounded site near the mouth of Bintulu River to Bintulu at M$300.00 each	$ 1,200.00
(4) The cost of towing *Yuling No. 2* from Bintulu to Miri by 2 tugboats from the 18th to 24th day of January, 1968 (7 days) at M$400.00 each boat per day	$ 5,600.00
(5) The cost of hiring 2 tugboats to pull *Yuling No. 2* to facilitate upturning at M$200.00 each boat per day for 3 days	$ 1,200.00